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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1899

HONORABLE EDWARD J. McMANUS, Chief Judge, United States District Court, Northern District of Iowa, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

Honorable Edward J. McManus, Chief Judge, United States District Court, Northern District of Iowa and the defendants in the district court[1/] pray that a Writ of Certiorari

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1/ Robert Elkins, Howard K. Cohen, Stephen R. Ginsburg, Angelo M. Giudice, and Daniel Goldburg are also petitioners in this case,
(cont. p. 2)

issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on May 13, 1976, granting a writ of mandamus which reversed petitioner McManus' order of October 1, 1975 granting a motion for a change of venue in United States v. Elkins, et al., No. CR 75-4022 (N.D. Iowa) from the Northern District of Iowa to the Central District of California. A petition for rehearing was denied on June 2, 1976.

OPINIONS BELOW

Petitioner McManus' initial decision of December 6, 1974 granting the motions to change venue, which is unreported, is reprinted in

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1/ (cont. from p. 1)
having been named as defendants in the district court. They were not specifically named as respondents in the Court of Appeals, but, by virtue of Rule 21(b) of the Federal Rules of Appellate Procedure, were "deemed respondents for all purposes." They filed separate opposition in the Court of Appeals. By virtue of this Court's Rule 21(4) these defendants, as "parties" in the Court of Appeals, "shall be deemed parties in this court. . . ." Because of their number, these defendants are listed here instead of the caption. See Stern and Gressman, Supreme Court Practice (4th ed. 1969) p. 285.

Appendix No. 1. The decision of the United States District Court for the Central District of California, which dismissed the indictment on May 22, 1975 after the transfer, is reported as United States v. Elkins, 396 F.Supp. 314 (C.D. Cal. 1975) and is reprinted in Appendix No. 2. The second unreported decision of petitioner McManus granting motions to change venue filed in response to defendants' reindictment, was rendered October 1, 1975, and is reprinted in Appendix No. 3.

The decision of the Court of Appeals granting the writ of mandamus will be reported as _____ F.2d _____ (8th Cir. 1976) and is reprinted in Appendix No. 4. The order denying the petition for rehearing en banc is reported in Appendix No. 5.

JURISDICTION

The judgment of the Court of Appeals was entered May 13, 1976. The order denying a timely petition for rehearing en banc was entered June 2, 1976. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Supreme Court's holdings in Miller v. California, 413 U.S. 15 (1973) and Hamling v. United States, 418 U.S. 87 (1974) that determinations of obscenity under local community standards may be made by jurors drawing on their own knowledge of the community from which they come, render changes of venue under Rule 21(b) of the Federal Rules of Criminal Procedure in obscenity cases inconsistent as a matter of law with the interests of justice.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 3, Section 2, Clause 3 of the United States Constitution:

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[2] The question was taken basically from that presented by the Government in its Petition for Writ of Mandamus filed with the Court of Appeals. Petitioners herein did change "are" to "may;" this change goes to the heart of the problem, the ambiguity of Miller and Hamling on this point: the role of the juror in obscenity cases.

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

The First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 18, United States Code, Section 1461, provides in pertinent part, as follows:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and --

. . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . .

. . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any

letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

"The term 'indecent' as used in this section includes matter of a character tending to incite arson, murder, or assassination."

Title 18, United States Code, Section 1462, provides in pertinent part, as follows:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or

knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce --

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

. . .

"Whoever knowingly takes from such express company or other common carrier any matter, or thing the carriage of which is herein made unlawful --

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Title 18, United States Code, Section 3237, provides, in pertinent part, as follows:

"(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one

district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

. . . ."

Rule 21(b) of the Federal Rules of Criminal Procedure provides as follows:

"(b) For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

STATEMENT OF THE CASE

Petitioners Robert Elkins, Howard K. Cohen, Stephen R. Ginsburg, Angelo M. Giudice and Daniel Goldblum and one Richard J. Aronson were indicted on July 11, 1974 by the Grand Jury in the Northern District of Iowa for allegedly violating 18 U.S.C. §§ 1461 and 1462 (postal obscenity statutes). U.S. v. Elkins, et al., No. 74-4015. All defendants moved for a change of venue to the Central District of California. On December 6, 1974 petitioner McManus, Chief Judge of the Northern District of Iowa, granted the motions and set forth his reasons in his decision (Appendix No. 1). Petitioner McManus pointed out in his decision that "evidence may be received in the Central District of California as to the contemporary community standards of the affected areas of Iowa." Petitioner McManus relied specifically on this Court's statement in Hamling v. United States, 418 U.S. 87, 106 (1974):

"But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide."

Petitioner specified the facts[3/] which supported the transfer under Rule 21(b). The Government, respondent herein, declined to seek appellate review of the transfer order.

In the Central District of California, U.S. v. Elkins, et al., No. CR 74-1828, District Judge E. Avery Crary, over the objection of the defendants, dismissed the indictment on his own motion, rejecting the views and ruling of petitioner McManus. United States v. Elkins, 396 F.Supp. 314 (C.D. Cal. 1975). Judge Crary, applying Hamling and Miller, arrived at the opposite conclusion from petitionerMcManus. Judge Crary determined that an obscenity case cannot be transferred because of the special role juries play in determining their community standards. Prior to making his ruling, Judge Crary recognized that the law was not clear, that there was "authority either way," and that the Government should appeal the dismissal in order to have the matter decided by the Court of Appeals. Judge Crary, since retired, said, prior to ruling,

> "My feeling is that this is a matter that should be determined by the Court of Appeals as soon as possible . . . ."

3/ The evidence warranting the transfer was overwhelming. Respondent has not disputed it but instead has argued as a matter of law venue cannot be changed.

Judge Crary also said,

> "I say there's authority either way. That's all the more reason it should be something that should be decided by the Court of Appeals."

Judge Crary repeated these thoughts numerous times in the course of the proceedings prior to his decision.

After Judge Crary's dismissal on May 22, 1975, defendants requested that respondent appeal the dismissal to the Court of Appeals for the Ninth Circuit. Defendants objected to the Government's attempt to re-indict them in Iowa. Notwithstanding the objections to re-indictment and the request to appeal, respondent declined to appeal; instead it sought and obtained the re-indictment of petitioners[4/] in the Northern District of Iowa on June 19, 1975. U.S. v. Elkins, et al., No. CR 75-4022.

Motions to change venue were again filed by all defendants (petitioners herein) and once again petitioner McManus granted the motions.

4/ Richard J. Aronson, indicted initially on July 11, 1974, was named only as an unindicted co-conspirator in the "second" indictment. Of course, the term "petitioners" here does not include petitioner McManus.

Petitioner, agreeing with respondent's contention that the matter was not res judicata, reached the merits of the matter and specifically considered the fact that Judge Crary disagreed with him, and concluded that Judge Crary's decision and, in particular, his interpretation of Hamling, were wrong. Petitioner McManus noted that a second judge in California might disregard Judge Crary's previous dismissal and provide a forum for the Government. Petitioner McManus also pointed out that the Government's quandry (no forum) was its own creation since it neither sought appellate review of the initial transfer nor sought appellate review of Judge Crary's dismissal.

With respect to the merits of the motion, petitioner McManus, exercising his discretion under Rule 21(b) set forth the specific facts which compelled transfer under Rule 21(b). In a well reasoned, finely written opinion, petitioner McManus examined all the relevant factors[5/] and concluded that a transfer was required. Petitioner's order transferring the matter was entered October 1, 1975, but respondent's

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5/ Defendants' residences, location of possible witnesses, location of events likely to be in issue, location of documents and records likely to be involved, disruption of defendants' business, expense to the parties, location of counsel, relative accessibility of the place of trial, docket conditions of each district involved.

Petition for Writ of Mandamus was not filed in the Court of Appeals until November 17, 1975. In the meantime, the file was again sent to the Central District of California, where the case now sits. U.S. v. Elkins, No. 76-104. There have been no arraignments because all concerned are waiting for the final disposition of this matter.[6/]

Defendant petitioners appeared in the Court of Appeals by filing Opposition papers and an Answer even though they were not specifically named as respondents. In their papers these defendant petitioners contested the jurisdiction of the Eighth Circuit to entertain the Petition for Writ of Mandamus because basically the validity of the decision of the Central District of California was the major issue, yet the Eighth Circuit was powerless to review it.[7/] They

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6/ There is also a file remaining in the Northern District of Iowa.

7/ The real basis for the Court of Appeals' decision is revealed by the following statement in its opinion:

> "The end result is to require that these defendants must be tried in Iowa, if they are to be tried at all."

If this Court grants certiorari, reverses the judgment of the Court of Appeals, and reinstates petitioner's order changing venue, the defendants

(cont. p. 15)

pointed out that an erroneous decision of a district court beyond the reach of the Eighth Circuit could improperly affect the outcome of the case.

Instead, these defendants (petitioners herein) repeated their request that the matter be reviewed immediately by the United States Supreme Court. Prior to respondent's filing of the Petition for Writ of Mandamus in the Eighth Circuit on November 17, 1975, petitioners filed a demand in the Northern District of Iowa that respondent seek review of the October 1 order changing venue directly in the United States Supreme Court. Among other things, petitioners requested the Eighth Circuit to certify the matter to the United State Supreme Court.

On May 13, 1976 the Court of Appeals rendered its decision in this matter and, on June 2, 1976 denied petitioner McManus' petition for a rehearing en banc.

7/ (cont. from p. 13)
will be tried in California. The district court there will have obtained the review it repeatedly suggested the Government obtain.

Unlike the Court of Appeals for the Eighth Circuit, this Court is not "powerless" to review the erroneous decision of the District Court for the Central District of California. This petition presents this Court with the last opportunity to review the California decision. The Central District of California is waiting for appellate review of its decision.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court should grant certiorari in order to resolve a major controversy relating to venue in obscenity cases which was created by ambiguities in Hamling v. United States, supra. Petitioner McManus has determined that nothing in Hamling bars venue changes in obscenity cases. The District Court for the Central District of California, in this very same case, has concluded that because this Court in Hamling emphasized the role of local jurors in determining the community standard, venue may not be changed in obscenity cases. Because two different district courts have, in the same case, read this Court's Hamling decision differently, and because the issue is a recurring one affecting cases throughout the United States, this Court should settle the matter.

Respondent agrees that this case presents an important issue which should be resolved at the appellate level. Respondent, in petitioning the Court of Appeals for a Writ

of Mandate, told the Court of Appeals,

> "The case at bar presents novel and important questions regarding venue in obscenity cases which are as yet unconsidered at the appellate level, and are desperately in need of guidelines to prevent the recurrence of the procedural stalemate here presented."[8/]

As will be demonstrated later, the Court of Appeals failed to resolve the issue framed by respondent; it did, however, let stand the decision of the District Court for the Central District of California, which resolved the issue erroneously in a published opinion. An erroneous district court decision on a major issue which is being cited by district courts across the nation should not go unreviewed. The decision should either be approved or disapproved by an appellate tribunal competent to do so. Because of the peculiar procedural posture this case is in, this petiton presents the last opportunity for appellate review of Judge Crary's decision.

8/ Government's Petition for Writ of Mandamus filed with United States Court of Appeals for the Eighth Circuit, U.S. v. McManus, No. 75-1868, p. 7.

B. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SO FAR SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT OF THE CENTRAL DISTRICT OF CALIFORNIA AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Rule 19 of this Court's rules provides that certiorari will be considered "where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

In the instant case the Court of Appeals has clearly misused the important writ of mandamus, which has historically been used to compel action which a lower tribunal is by law obligated to take; it has not been and should not be, used to review the exercise of discretion. Petitioner McManus clearly had the discretion under the strong showing made to change venue. Rule 21(b) of the Federal Rules of Criminal

Procedure gave petitioner such discretion. The Court of Appeals should not have interferred with petitioner's discretion unless, perhaps, it was prepared to rule that as a matter of law defendants in obscenity cases may never have venue changed because of this Court's Hamling decision. That was the view of the District Court in California and respondent's view. Since, apparently, the Court of Appeals did not go quite so far, petitioner's discretion should not have been upset. The Court of Appeals has misused the writ of mandamus in this case.

Moreover, the Court of Appeals apparently based its decision on the erroneous ruling of the Central District of California. Thus, the Court of Appeals has "sanctioned" the California Court's departure "from the accepted and usual course of judicial proceedings . . . ." The Court of Appeals alludes to the California decision, which it does not disapprove, by its comment,

> "The present situation is further limited by the determination of Judge Crary, which we are powerless to alter, that if the case were tried in his court, the government could not prove the obscene nature of these materials solely by the use of expert testimony."

The decision of the Central District of California has not been, and now cannot be reviewed by the Court of Appeals for the Ninth

Circuit. The Court of Appeals for the Eighth Circuit acknowledges it cannot review it. Thus, this Court is the only court which can still review the decision of the Central District of California, which, petitioners respectfully submit, is patently erroneous. Even Judge Crary, in rendering his decision, expressed doubt and a desire for appellate review. If this Court denies certiorari, Judge Crary's decision will go unreviewed. This would be intolerable; the decision has had a tremendous impact throughout the nation. District Courts throughout the United States are now denying venue motions solely because of Judge Crary's published decision. See, e.g., Novick v. United States District Court, 423 U.S. 911 (1975).

By appellate forum shopping,[9/] respondent has been able to prevent judicial review of Judge Crary's decision: respondent knew the Eighth Circuit had no jurisdiction to review a district court decision from another circuit. See Johnson v. Associate Finance, Inc., 365 F.Supp. 1380 (D.C. Ill. 1973) (D.C. Ill. not bound by 9th Circuit); In re Etherton, 88 F.Supp. 874 (D.C. Cal. 1950) (D.C. Cal. not bound by

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9/ Respondent deliberately avoided the only courts with authority to review Judge Crary's decision: This Court and the Ninth Circuit. Respondent ignored defendants' requests that it seek appellate review in the Ninth Circuit and mandamus in this Court.

2nd Circuit); U.S. v. San Diego Grower's Ass'n., Inc., 177 F.Supp. 607 (S.D. Cal. 1959) (Southern District of Calif. not bound by 10th Circuit).

A decision of this magnitude which affects the administration of justice throughout the United States in the important area of First Amendment conduct and in other constitutional spheres[10/] should be reviewed by some appellate tribunal, especially because the California decision, purporting to follow Hamling, is erroneous.

A close reading of the Court of Appeals' decision in the instant case reveals that it is in conflict with the decision of the Central District of California, at least on a theoretical level: Judge Crary's ruling absolutely forbids venue changes in obscenity cases, yet the Court of Appeals purports to leave the door open in some hypothetical case involving "intentional over-reaching by the government," whatever that means. If the Court of Appeals really believes that changes of venue are still possible, there was no reason to overturn petitioner McManus' decision herein. Because the decision of the Court of Appeals is so confusing, in possible conflict with the Central District of California, and because the Court of Appeals either failed to resolve the question presented to it by respondent or decided it erroneously, this Court

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10/ See Article 3, Section 2, Clause 3 and the Fifth and Sixth Amendments.

should grant certiorari.

C. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals' statement that it has "no choice but to order that this case be tried in Iowa" "in view of the recent decisions of the Supreme Court that obscenity vel non must be determined on a local community standard," is in conflict with Hamling v. United States, supra, one of the decisions upon which it purports to rely. In Hamling, this Court specifically stated that evidence of standards existing in some place outside of the trial district would be admissible. Nothing in Hamling precludes a change of venue in an obscenity case. To the extent the Court of Appeals has arrived at the opposite conclusion, its decision is in conflict with this Court's Hamling decision.

The Court of Appeals' decision virtually violates defendants' rights to a fair trial, effective assistance of counsel, and procedural due process insofar as it can be read as judicial repeal of Rule 21(b) in obscenity cases. While 18 U.S.C. § 3237 permitted the initiation of criminal proceedings against petitioners herein

in the Northern District of Iowa, the principles recognized by Article 3, Section 2, Clause 3, and the Fifth and Sixth Amendments to the United States Constitution, which were incorporated by Rule 21(b), required the transfer order in the instant case. That is, the discretion granted to district courts by Rule 21(b) permits district courts to consider the policy in favor of local trials expressed by these constitutional provisions. The Court of Appeals' decision completely disregards the strong showing made by the defendants in this case.

CONCLUSION

Petitioners, in conclusion, wish to emphasize that they do not contend that district courts must always grant motions to change venue to defendants' home districts in postal obscenity cases; rather, it is a matter of discretion for the district court. When such discretion results in a transfer, a court of appeal may not overrule the district court unless, as a matter of law, venue may never be changed which, petitioners contend, should not be the law.

Accordingly, for the reasons expressed herein, this Petition for Writ of Certiorari should be granted and the judgment of the Court of Appeals should be reversed.11/

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Petitioners

11/ The granting of certiorari will permit this Court to consider this case along with Smith v. United States, No. 75-1439 (cert. granted June 21, 1976) which is also from the Eighth Circuit and which involves another aspect of the community standard issue raised by Miller and Hamling. It, too is from an Iowa federal court.

APPENDIX

APPENDIX NO. 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. CR 74-4015

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT ELKINS, et al.,
Defendants.

ORDER

(Filed December 6, 1974)

This matter is before the court upon the defendants' resisted motions for change of venue and various other resisted motions.

It is the court's view that the defendants' motions for change of venue should be granted and decisions on the remaining motions is properly to be reserved for the court which will eventually try this case.

FRCrP 21(b) provides in part that

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him . . . to another district.

The convenience problems in this case loom large. All defendants and apparently all witnesses whose testi-

mony cannot be stipulated reside in California. From the affidavits submitted by defendants and their attorneys, it appears that the hardships in terms of financial, employment and health problems which defendants would be subjected to by trial in this District are substantial. Inconvenience of a lesser degree would also be occasioned to all trial witnesses by the necessity to travel some 2,000 miles to testify. The convenience of the government is served equally well whether trial is had in Iowa or California since it has adequate prosecutorial resources in both locations.

The major argument in opposition to transfer is that under *Miller* v. *California*, 413 U.S. 15 (1973), the requirement that allegedly obscene materials be judged by contemporary community standards requires application of the standards of the state or locale where distribution of the materials occurred, rather than "hypothetical and unascertainable" national standards previously thought applicable under *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). Against this proposition, defendants' objection that they were unable to ascertain contemporary community standards where the challenged materials were disseminated is unavailing. Defendants must have known that the items they distributed were arguably obscene and they certainly knew where distribution occurred. Thus, it was incumbent upon defendants to make a reasonable attempt to ascertain the standards of the area to which their materials were sent, or run the risk of prosecution. Any other view of this issue would permit the studied ignorance of a pornographer located on New York City's 42nd Street of all non-local standards to provide absolute insulation from prosecution for distribution of materials patently offensive to the standards of the communities in which distribution occurs. In *Roth* v. *United States*, 354 U.S. 476 (1957), the Court held that 18 USC §1461, when "applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards . . . or fail to give . . . adequate notice of what is prohibited." The same must be true for §1462, and defendants' contention that they have been deprived of the notice aspect of due process must fail.

However, it is not necessary to the application of community standards found in northwest Iowa that trial be had in this District. In *Hamling* v. *United States*, ... U.S. ..... (June 24, 1974), the Court said that simply because a trial is held in a certain District, it does not follow that the trial "Court would not be at liberty to admit evidence of standards existing in some place outside of [the trial] district, if it felt such evidence would assist the jury in the resolution of the issues which they [must] decide." Thus under *Miller* it is not necessary that the relevant community standards be applied by a jury from the same community. Upon motion by the prosecution, evidence may be received in the Central District of California as to the contemporary community standards of the affected areas of Iowa. This avoids the problem which would arise were defendants only to be judged according to the standards of the place of trial.

In view of the hardship and inconvenience to defendants and witnesses from trial in Iowa and the admissibility of Iowa community standards in a California federal court, both convenience of the parties and witnesses and the interests of justice require a change of venue in this case.[1] *Platt* v. *Minnesota Mining and Mfg. Co.*, 376

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1. While the issue of docket congestion in the transferee district has not been raised by the government, if such does in fact exist, the transferor judge upon request is available to try the case promptly in the Central District of California.

U.S. 240 (1963); *Jones* v. *Gasch*, 404 F.2d 1231 (CA D.C. 1967). See also 8 *Moore's Fed. Prac.* §21.04[1] et seq.

It is therefore

ORDERED

Motion for change of venue to the Central District of California, granted; the Clerk shall forthwith forward the files in this matter to the Clerk of the U.S. District Court for the Central District of California.

December 6, 1974.

/s/ Edward J. McManus
Edward J. McManus, Chief Judge
United States District Court

APPENDIX NO. 2

(Now Reported as *United States* v. *Elkins*, 396 F.Supp. 314 (C.D. Cal. 1975)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 74-1828

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT ELKINS, HOWARD K. COHEN, RICHARD J. ARONSON, STEPHEN R. GINSBURG, ANGELO M. GIUDICE, and DANIEL GOLDBLUM, aka DANNY GOLD, all doing business as HOLLYWOOD LTD., METROPOLITAN MERCANTILE, and PRECISION FITTINGS,
Defendants.

MEMORANDUM OPINION AND ORDER OF DISMISSAL

(Filed May 22, 1975)

The Indictment in the within action was filed in the Northern District of Iowa and charges the defendants with conspiracy to cause to be delivered by mail certain nonmailable, obscene and lewd advertisements, motion picture films, and information as to the obtaining of said material, and using common carriers to carry said material in interstate commerce, in violation of Sections 1461 and 1462, Title 18, United States Code.

The case was transferred to this District from the Northern District of Iowa by order for change of venue for the convenience of parties and witnesses. After ruling that the contemporary standards, as to obscenity, of the Northern District of Iowa, the area of the distribution of the material, should be applied, the Iowa Court concluded that under *Miller* v. *California*, 413 U.S. 15 (1973), "it is not necessary to the application of community standards found in northwest Iowa that trial be had in this District. In *Hamling* v. *United States*, 418 U.S. 87 (June 24, 1974), the Court said that simply because a trial is held in a certain District, it does not follow that the trial 'Court would not be at liberty to admit evidence of standards existing in some place outside of [the trial] district, if it felt such evidence would assist the jury in the resolution of the issues which they [must] decide.' Thus under *Miller* it is not necessary that the relevant community standards be applied by a jury from the same community. Upon motion by the prosecution, evidence may be received in the Central District of California as to the contemporary community standards of the affected areas of Iowa. This avoids the problem which would arise were defendants only to be judged according to the standards of the place of trial."

The Government opposed the defendants' motion for change of venue, and prior to trial in this District moved for an evidentiary ruling as to whether the contemporary community standards in the Northern District of Iowa, as opposed to the standards in this District, would be the standards applied in the trial of the case. By written order filed May 19, 1975, this Court ruled that only evidence as to the contemporary community standards for the Northern District of Iowa would be admitted as to this issue. It was further ordered that the Iowa community standards

could not be proven solely by expert testimony, since expert testimony is admissible only to assist a jury in determining standards outside the District of trial.

The Court concludes that an attempt by the Government to prove its case in this forum solely by expert testimony would not provide a proper basis on which the jury could determine the obscenity of the materials in the case at bar because of the special and integral part that the knowledge of a juror of the community from which he comes plays in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

It appears from the opinion of the Supreme Court of the United States in *Miller* v. *California*, 413 U.S. 15, 24, that the basic guidelines for the trier of the fact in an obscenity case must be

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin, supra*, at 230, quoting *Roth* v. *United States, supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The Supreme Court in *Hamling* v. *United States*, 418 U.S. 87, observed that in the Miller case, supra, the Court had abandoned the application of the national standards of obscenity because of the difficulty in formulating such uniform standards and emphasized

> "the ability of the juror to ascertain the sense of the 'average person, applying contemporary community

standards' without the benefit of expert evidence, clearly indicates that 18 U.S.C. § 1461 is not to be interpreted as requiring proof of the uniform national standards which were criticized in *Miller.*" Id. 105.

In commenting on the test as stated in the Miller case, the Court in *Hamling* says:

> "the test was stated in terms of the understanding of 'the average person, applying contemporary community standards.' *Id.*, at 24. When this approach is coupled with the reaffirmation in *Paris Adult Theatre I* v. *Slaton,* 413 U.S., at 56, of the rule that the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials, the import of the quoted language from *Miller* becomes clear. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.
>
> * * *
>
> The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw." Id. 104-106.

The Court thereafter stated:

> "But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide."

However, the Court in Hamling was concerned with the national standards as to which evidence had been adduced as well as the application of contemporary community standards.

Defendants argue that this Court's ruling will violate their right to change of venue. The Supreme Court has recognized the fact that different community standards would likely be applied in different communities in which cases are prosecuted. *Hamling* v. *United States,* supra, 107. The defendants knew when they distributed the material involved in Iowa that the Government could prosecute for allegedly obscene matter in the area of distribution, and the defendants, in making distribution of the material in Iowa, assumed the risk of prosecution and trial in that State under its contemporary community standards as to obscenity.

The fact the Government is authorized to seek an Indictment in either California or Iowa, 18 U.S.C. § 3237, should not affect its right to subject the defendants' material to the community standards of Iowa and this right should not be defeated by a transfer of the case to a jurisdiction where, under the decisions of the Supreme Court, the fact finder is not in a position to determine the Iowa standards.

The general rule requires that on change of venue in a civil case the law of the jurisdiction of the transferor court is to be applied at trial by the court in the trans-

feree District. The universal application of Federal statutes throughout the country creates a novel problem in the instant case by reason of the statutory right of the Government to prosecute the case in the District of distribution of the allegedly obscene material, the rulings of the Supreme Court that the finder of the fact must apply his or her knowledge of the community standards of the community in which he or she resides, and the lack of knowledge of the transferee fact finder as to the requisite community standards of the transferor District which must be applied.

The Government suggests it might prove the Iowa community standards by expert witnesses but although such testimony might be of assistance to a jury in this District it could not be a substitute for or eliminate the need for the knowledge of each juror which he or she would have drawn from the community of his residence as to the applicable community standards.

The Court concludes that a jury selected from the residents of this District could not determine the contemporary community standards of the Northern District of Iowa by reason of its members not possessing the knowledge of a juror in Iowa of the community standards in which the Iowa juror resides, necessary in deciding what conclusion the average person, applying the contemporary community standards of Iowa, would reach based on the facts adduced in the instant case. There are a number of similar criminal cases now pending in this District by reason of orders transferring them from District Courts in other States on motions for change of venue like that in the instant matter. This Court concludes that it was not the intention of the Supreme Court or Congress, as indicated by the current case and statutory law, that a District Court Judge or jury in the Central District of Cali-

fornia should decide the standards of obscenity to be deemed the contemporary community standards of any and all States in the Union from which these cases may be transferred on motions for change of venue resulting from the fact that the allegedly obscene material was made or published in this District.

On its own motion, the Court orders that, for the reasons stated above, the Indictment pending herein is hereby dismissed.

DATED: May 22, 1975.

/s/ E. Avery Crary
E. Avery Crary
United States District Judge

APPENDIX NO. 3

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. CR 75-4022

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT ELKINS, et al.,
Defendants.

ORDER

(Filed October 1, 1975)

This matter is before the court on defendants' resisted motions for change of venue filed July 7 through July 15, 1975.

Defendants are charged with mailing "obscene" material.[1] Defendants were originally indicted July 11, 1974, in Sioux City, Iowa. That case was transferred on defendants' resisted motion for change of venue to the Central District of California where it was dismissed May 28, 1975. Defendants were then reindicted on June 19, 1975 in Sioux City, Iowa; and with the exception of one defendant being dropped and named as an unindicted co-conspirator,

1. Count 1 alleges violations of 18 USC §§1461, 1462 & 371. Counts 2 through 14 allege violations of 18 USC §2 and 1461. All defendants are named in each count.

the 14-count indictment was the same as the previous indictment. There are now 5 defendants.

Defendants contend that their situation has not changed since this court's previous order granting change of venue, that the previous order is res judicata, and that their affidavits indicating they will stipulate to the testimony of any Iowa witnesses leave no reason to keep this case in Iowa.

The Government argues against res judicata and claims that the interests of justice outweigh any inconvenience to defendants and require venue to be in this district because of the difficulty in proving Iowa community standards in California, and that since a Central District of California judge has refused to try this case plaintiff will be denied a forum if defendants' motion is granted.

This court agrees with plaintiff that its previous order is not res judicata to this action. As a general rule, the doctrine of res judicata applies where there has been a previous action between the same parties involving the same subject matter in which a final judgment on the merits has been rendered with respect to the same cause of action. *Bryson* v. *Guar. Reserve Life Ins. Co.*, Civil No. 75-1122 (8th Cir. July 30, 1975); *Rhodes* v. *Jones*, 351 F.2d 884 (8th Cir. 1965), *cert. denied*, 383 U.S. 919 (1966); *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964). An order transferring an action is interlocutory and not a final judgment on the merits, *McCreary Tire & Rubber Co.* v. *Ceat*, 501 F.2d 1032 (3rd Cir. 1974), and therefore probably does not afford the basis for res judicata. *Washington Building Serv., Inc.* v. *Janitorial Serv., Inc.*, 352 F.2d 678 (7th Cir. 1965).

In any event, the fact that a Central District of California judge has dismissed the action adds a new issue to the controversy which this court's previous ruling could not have covered.

It is still this court's view, however, that defendants' motions for change of venue, pursuant to Rule 21(b) FRCrP, should be granted. In reaching this decision, the following factors have been considered:

(1) Defendants' residences. *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1963); *United States* v. *National City Lines*, 334 U.S. 573 (1948); *United States* v. *Cashin*, 281 F.2d 669 (2nd Cir. 1960); *United States* v. *Jessup*, 38 F.R.D. 42 (M.D. Tenn. 1965); *United States* v. *Olen*, 183 F.Supp. 212 (S.D. N.Y. 1960). All 5 defendants are from Los Angeles County, which is 2000 miles from the Northern District of Iowa. In *United States* v. *Johnson*, 323 U.S. 273 (1944) at 275, the Supreme Court observed:

> "Thus, an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district. Plainly enough such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.
>
> "These are matters that touch closely the fair administration of justice and public confidence in it, on which it ultimately rests."

(2) Location of possible witnesses. *Platt*, supra; *Cashin*, supra; *Nat'l City Lines*, supra; *Olen*, supra; *Jessup*, supra. All witnesses need only be from Los Angeles County. Defendants have sworn by affidavit to their willingness to stipulate to the testimony of any Iowa witnesses, including the fact that Iowa witnesses will testify the materials in question are "obscene." From the indictment it appears that the Government will need to call several witnesses from Los Angeles County, including the printer, the lessor of the mailing equipment, a bank official, the custodians of the various postal forms, the seller of the gummed labels and the unindicted co-conspirator.

(3) Location of events likely to be in issue. *Platt*, supra. If the Government accepts defendants' stipulation, only the events occurring in Los Angeles County will be in issue, including the rental of printing and mailing equipment, the acquisition of postal forms, and the conspiracy.

(4) Location of documents and records likely to be involved. *Platt*, supra; *Nat'l City Lines*, supra; *Jessup*, supra. Any relevant bank, postal, or business records are in Los Angeles County.

(5) Disruption of defendants' business. *Platt*, supra; *Olen*, supra; *Cashin*, supra; *Jessup*, supra. Defendant Gold has sworn by affidavit that as office manager at Allstate Business Directory in Los Angeles, his absence of a week or more would severely impede the efficient operation of the firm. He is sole support of his wife and child and contributes to the support of his disabled parents, who are over 65 years old. Defendant Ginsburg has sworn by affidavit that absence from his employment as a group medical and life insurance salesman in California would prevent him from earning sufficient commissions to support his wife and 2 children.

(6) Expense to the parties. *Platt*, supra; *Olen*, supra; *Cashin*, supra. All defendants have sworn by affidavit to the meagerness of their financial resources, and the added expenses of lodging and transportation in connection with bringing 5 defendants, 4 lawyers, and numerous witnesses from Los Angeles County to the Northern District of Iowa are obvious. Equally obvious is the fact that the Government would also be put to less expense, in light of defendants' willingness to stipulate to the testimony of Iowa witnesses, if the case is transferred to the Central District of California.

(7) Location of counsel. *Platt*, supra. All defense attorneys are from Los Angeles County and the Government has counsel in either location.

(8) Relative accessibility of the place of trial. *Platt*, supra; *Nat'l City Lines*, supra. Plane travel is the only practical mode of transportation between Los Angeles and Sioux City, Iowa with scheduling and layover problems to be expected.

(9) Docket conditions of each district involved. *Platt*, supra. The Central District of California's median time for disposition of a criminal case was 3-1/2 months in 1974; the Northern District of Iowa's median time was 2-1/2 months.[2] This presents no appreciable difference.

In balancing the inconvenience to the parties, *Jones* v. *Gasch*, 404 F.2d 1231 (C.A. D.C. 1967), *cert. denied*, 390 U.S. 1029 (1968); *United States* v. *Luros*, 243 F.Supp. 160 (N.D. Ia. 1965); *United States* v. *Cohen*, 35 F.R.D. 227 (N.D. Calif. 1964); *United States* v. *West Coast News Co.*, 30 F.R.D. 13 (W.D. Mich. 1962), the October 31, 1974 affidavit of Dr. Gordon L. Freeman, stating that because

2. *Management Statistics for the United States Courts*, 1974. Prepared by the Administrative Office of U.S. Courts.

of a heart condition defendant Elkins should do no traveling in the near future, and the fact that Elkins' presence is required in California on 4 similar criminal matters, have also been given consideration. Finally, consideration has also been given to the prosecution's prerogative in the initial choice of venue and its interest in the preservation of Iowa morals. It is this court's view that there is a substantial inconvenience to the defendants which outweighs any inconvenience to the plaintiff and that a transfer would be for the convenience of parties and witnesses and in the interest of justice.

As to "the difficulty of proving Iowa standards of obscenity in a distant locale," we noted in our previous ruling in this matter that in *Hamling* v. *United States*, 418 U.S. 87 (1974), the Court said that simply because a trial is held in a certain District, it does not follow that the trial "Court would not be at liberty to admit evidence of standards existing in some place outside of [the trial] district, if it felt such evidence would assist the jury in the resolution of the issues which they [must] decide." Thus under *Miller* v. *California*, 413 U.S. 15 (1973) it is not necessary that the relevant community standards be applied by a jury from the same community. Upon motion by the prosecution, evidence may be received in the Central District of California as to the contemporary community standards of the affected areas of Iowa. This avoids the problem which would arise were defendants only to be judged according to the standards of the place of trial.

Also in *Hamling*, supra at 109, the Supreme Court noted "the confusing and often gossamer distinctions between 'national' standards and other types of standards."

Further, under *Miller*, supra at 29, "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," is only one of three "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." Iowa community standards are not necessary to the proof of these other factors.

Nor is it felt that the Government will be deprived of a forum if defendants' motion is granted. While some courts are of the view that review of a transfer order by a court of coordinate jurisdiction is a usurpation of an appellate function which could lead to an interminable shuttle between courts, *Technitrol, Inc.* v. *McManus*, 405 F.2d 84 (8th Cir. 1968); *Devex Corp.* v. *General Motors Corp.*, 263 F.Supp. 17 (D.C. Del. 1967); *Gulf Research & Development Co. et al.* v. *Schlumberger Well Surveying Corp.*, 98 F.Supp. 198, 201 (D.C. Del. 1951), mandamus denied sub nom. *Gulf Research & Development Co.* v. *Leahy*, 193 F.2d 302 (3rd Cir. 1951), aff'd, 344 U.S. 861; *Rinaldi, et al.* v. *The Elizebeth Bakke*, 107 F.Supp. 975 (N.D. Cal. 1952), Judge Crary of the Central District of California apparently felt dismissal warranted. And though ordinarily one judge does not consider a point previously decided by a judge of coordinate jurisdiction, *Pacific-Atlantic Steamship Co.* v. *U. S.*, 127 F.Supp. 931 (D.C. Del. 1955) (and cases cited therein), a second Central District of California judge may disregard Judge Crary's previous dismissal and provide a forum for the Government. The Government's present quandry is to some extent its own creation since it chose not to appeal this court's transfer or Judge Crary's dismissal. If the case were again dismissed by the Central District of California, plaintiff would still have a forum in the appropriate appellate procedure.

The logical extension of plaintiff's argument is that change of venue is never appropriate in "obscenity" cases. This court finds this to be an overly strict interpretation of *Miller*, supra.

It is therefore

ORDERED

Motion for change of venue to the Central District of California, granted; the Clerk shall forthwith forward the files in this matter to the Clerk of the U. S. District Court for the Central District of California.

September 30, 1975.

/s/ Edward J. McManus
Edward J. McManus, Chief Judge
United States District Court

APPENDIX No. 4

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1868

United States of America,	*	
	*	
Petitioner,	*	
	*	Petition for
v.	*	Writ of
	*	Mandamus.
Honorable Edward J. McManus,	*	
Chief Judge, United States	*	
District Court, Northern	*	
District of Iowa,	*	
	* *	
Respondent.	* *	

Submitted: February 9, 1976

Filed: May 13, 1976

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

PER CURIAM.

The government petitions this Court for a writ of mandamus asserting that the District

Court erred in granting a motion for a change of venue in United States of America v. Robert Elkins, et al, No. CR 75-4022 (N.D. Ia. October 1, 1975). We find that the trial court did abuse its discretion and grant the writ. The record of this case, previously transferred to the Central District of California, shall be recalled and the case shall be tried in the Northern District of Iowa.

On July 11, 1974, a fourteen-count indictment was returned against six defendants, charging them with violating and with conspiracy to violate two postal obscenity statutes, 18 U.S.C. §§1461 and 1462, for the mailing from California of allegedly obscene advertisements and movies to Iowa. The defendants filed a motion for change of venue pursuant to Federal Rule of Criminal Procedure 21(b).[1] Chief Judge Edward J. McManus of the Northern District of Iowa granted the motion, and the case was transferred to the Central District of California. United States of America v. Robert Elkins, et al, No. CR 74-4015 (N.D. Ia. December 6, 1974).

1
Federal Rule of Criminal Procedure 21(b) states:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more of the counts thereof to another district.

Prior to trial in the Central District of California, the government moved for an evidentary ruling as to whether the contemporary community standards of the Northern District of Iowa or the Central District of California would apply at trial. The District Court, Judge E. Avery Crary presiding, held that the contemporary community standards of the Northern District of Iowa were applicable under the guidelines esatblished in Hamling v. United States, 418 U.S. 87, 102 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973); and Miller v. California, 413 U.S. 15, 24 (1973). It also held that these Iowa community standards could not be proven solely by the means of expert testimony. United States of America v. Robert Elkins, et al, No. 74-1828-EAC (C.D. Cal. May 19, 1975).

On May 22, 1975, the California District Court, sua sponte, dismissed the indictment. The court concluded that:

> a jury selected from the residents of this District could not determine the contemporary community standards of the Northern District of Iowa by reason of its members not possessing the knowledge of a juror in Iowa of the community standards in which the Iowa juror resides, necessary in deciding what conclusion the average person, applying the contemporary standards of Iowa, would reach based on the facts adduced in the instant case.

United States v. Elkins, 396 F.Supp. 315, 318 (C.D. Cal. 1975).
This dismissal was consistent with the action taken in five other obscenity cases transferred to the Central District of California since the Supreme Court's decision in Hamling v. United States, supra, and Miller v. California, supra.

The government chose not to appeal this dismissal to the Ninth Circuit Court of Appeals. Instead, five of the six defendants were reindicted in the Northern District of Iowa on June 19, 1975, on essentially the same charges as in the July 11, 1974, indictment. The defendants again moved for and were granted a change of venue by Judge McManus. United States of America v. Robert Elkins, et al, No. CR 75-4022 (N.D. Ia. October 1, 1975).

In this order, Judge McManus found that: (1) all the defendants and their attorneys live in California; (2) most of thewitnesses would come from California, especially in light of the defendants' willingness to stipulate to the testimony of any Iowa witnesses, including those who would testify that the material mailed was obscene; (3) the location of most of the documents, records and events likely to be at issue is in California in light of defendants' stipulation; (4) the defendants' bussinesses would be severely disrupted if trial was held in Iowa; and (5) one of the defendants has a heart condition which would make travel unwise. Judge McManus concluded that despite the preference given to the prosecution's initial choice of forum and

despite the fact that the District Court in California had dismissed the prior indictment a transfer was necessary in the interest of justice and convenience.

The government argues on appeal that the normal rules affecting transfers under Rule 21(b) do not apply in obscenity cases. It argues that under the contemporary community standard set forth in Hamling v. United States, supra; United States v. 12 200-ft. Reels, 413 U.S. 123 (1973); and Miller v. California, supra, the only appropriate finder of fact is a jury selected from the community in which the offense took place. Since the government chose to bring this indictment in Iowa, only an Iowa jury applying Iowa contemporary community standards can determine whether this material is obscene.[2]

We would ordinarily be reluctant to disturb the District Court's decision either to grant or refuse a request to transfer. However, the present situation requires a careful examination

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2 The government has the option under 18 U.S.C. §§1461 and 1462 to bring a postal obscenity case in either the district in which the allegedly obscene material was mailed or in the district where it was received. See United States v. Luros, 243 F.Supp. 160, 176-177 (N.D. Ia. 1965), rev'd on other grounds, 389 F.2d 200 (8th Cir. 1968).

of conflicting policies. Initially, we recognize that the government's choice of forum is ordinarily to be respected. However, the convenience of the defendants to be tried in the district where they live and work, where their attorneys reside and where the majority of the witnesses live may overcome that presumption.

Criminal defendants have no constitutional right to a trial in their home districts, nor does the location of a defendant's home have "independent significance in determining whether transfer to that district would be 'in the interest of justice.'" Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 245-246 (1964). The only applicable constitutional provisions are Article III, §2, and the Sixth Amendment which require the trial to be held in the state where the alleged crime has been committed. The prosecution has a choice of venue only in cases involving crimes occurring in more than one judicial district.

Rule 21(b) interjects into criminal law an analogue to the civil doctrine of forum non conveniens. Cf. 28 U.S.C. §1404(a). The Supreme Court has held that Congress may, by a special venue statute, deprive courts of their discretionary power to transfer cases arising under that statute. For example, in United States v. National City Lines, Inc., 334 U.S. 573 (1948), the Court held that the legislative history of §12 of the Clayton Act showed such a Congressional intent, and that a plaintiff's choice among several proper venues cannot be overriden. The plaintiff's choice was final even

when it was the United States that brought the case.

In the instant case, there is ample legislative history indicating Congress' concern to allow the district to which allegedly obscene matter is mailed (the recipient district) to institute the prosecution and to judge the character of the material under local standards. Congress specifically amended the postal obscenity statute in 1958 to permit the recipient district as well as the sending district to file the charges, since earlier decisions had held that venue existed only in the sending district.

In United States v. Luros, 243 F.Supp. 1160, 176 (N.D. Ia. 1965), rev'd on other grounds, 389 F.2d 200 (8th Cir. 1968), the court denied a motion for a transfer in an action brought under 18 U.S.C. §§1461 and 1462. It stated:

> The legislative history clearly indicates the intent of Congress in enacting the 1958 amendments to the obscenity statutes. During the course of the Congressional debate on the amendments, Representative Keating explained that:
>
> "The interpretation given by the courts has, to all intents and purposes, nullified previous Congressional action. They have said a promoter can be prosecuted only

> where he puts the material into the mail. As a result the community most affected by the crime, that is, the once where the stuff is circulated, has no opportunity whatsoever to protect itself.
>
> "The bill before us is intended to overcome the effect of judicial interpretation and thereby to increase materially the effectiveness of the present statute. Its purpose is to make abundantly clear that violators can be prosecuted either at the place of mailing, or at the place of address or delivery, ..." 104 Congressional Record 8043-8044 (1958).

In United States v. Luros, supra, the court also recited legislative history indicating that Congress did not intend to permit unrestricted "forum shopping" by allowing prosecution at any district through which this material might pass but only at the point where it was mailed and at the point where it was received. Id. at 176.

In addition to the specific intent demonstrated by Congress to allow the recipient district to prosecute, we are faced with the fact that by its decisions in Hamling and Miller, the Supreme Court has determined that one of the constitutional standards used to determine obscenity is local rather than national in

character. This requirement, coupled with the decision of the government to bring this indictm ment in Iowa, mandates that the obscenity vel non of these materials must be determined according to the Iowa contemporary community standards. The present situation is further limited by the determination of Judge Crary, which we are powerless to alter, that if the case were tried in his court, the government could not prove the obscene nature of these materials solely by the use of expert testimony. The end result is to require that these defendants must be tried in Iowa, if they are to be tried at all.

We recognize that the practical impact of our decision is to substantially reduce the rights of defendants in a postal obscenity suit to a transfer. This appears to conflict with the amendment to Rule 21(b) in 1966 that added considerations about the convenience of the forum to parties and witnesses. However, under the circumstances of this case and in view of the recent decisions of the Supreme Court that obscenity vel non must be determined on a local community standard, we have no choice but to order that this case be tried in Iowa. Our opinion should not be read to say that a Rule 21(b) transfer may never be granted in an obscenity case. A stronger showing than made here, such as intentional overreaching by the government, must be made, however, to overcome the government's choice of forum in postal obscenity cases.

We grant the writ of mandamus and order that the record of this case be recalled. The government has leave to refile its indictment if necessary.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

APPENDIX No. 5

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

75-1868 September Term, 1975

United States of America, Petit Petitioner,	)	Petition for Writ of Mandamus
vs.	)	
Honorable Edward J. McManus, Chief Judge, etc.,	)	
Respondent.	)	

The Court having considered petition for rehearing en banc filed by counsel for respondent and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 2, 1976

No. 75-1899

Supreme Court, U. S.
FILED
DEC 10 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

HONORABLE EDWARD J. McMANUS, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
JAMES A. HUNOLT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1899

HONORABLE EDWARD J. McMANUS, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4) is reported at 535 F. 2d 460. The orders of the United States District Court for the Northern District of Iowa (Pet. Apps. 1, 3) are unreported. The opinion of the United States District Court for the Central District of California (Pet. App. 2) is reported at 396 F. Supp. 314.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1976. A petition for rehearing and suggestion for rehearing *en banc* was denied on June 2, 1976 (Pet. App. 5). The petition for a writ of certiorari was filed on June 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in an obscenity case the "community standards" of the district in which the prosecution is commenced must be applied in a district to which the case is transferred and, if so, whether this should preclude the transfer of such a case.

2. Whether the court of appeals properly issued a writ of mandamus to correct the erroneous transfer.

STATEMENT

An indictment returned on July 11, 1974, in the Northern District of Iowa charged petitioners Robert Elkins, Howard K. Cohen, Stephen R. Ginsburg, Angelo M. Giudice and Daniel Goldblum, together with Richard J. Aronson, with mailing obscene material, transporting obscene material in interstate commerce, and conspiring to commit those offenses, in violation of 18 U.S.C. 1461, 1462, and 371. They moved to transfer the case to the United States District Court for the Central District of California, pursuant to Fed. R. Crim. P. 21(b). The government opposed the motion, arguing that, under *Miller* v. *California*, 413 U.S. 15, the local community standards of the community in which the materials were distributed should be applied at trial (Pet. App. 1, p. 2).

Petitioner McManus granted the motion, on the grounds that the defendants and most of the witnesses reside in California and that a trial in Iowa would be a hardship in light of financial, employment and health considerations (Pet. App. 1, pp. 1-2). The court held that the application of community standards of the district did not require a trial in that district, because a California jury could be instructed to apply Iowa community standards (Pet. App. 1, p. 3).

After the case was transferred to California, the prosecutor asked the judge there to enunciate the "community

standards" to be applied at trial. The judge held that Iowa standards would apply, and that they could not be proven solely by expert testimony (Pet. App. 2, pp. 2-3). He then dismissed the indictment *sua sponte*, reasoning (Pet. App. 2, p. 3):

> [A]n attempt by the Government to prove its case in this forum solely by expert testimony would not provide a proper basis on which the jury could determine the obscenity of the materials in the case at bar because of the special and integral part that the knowledge of a juror of the community from which he comes plays in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

The court held that the prosecution's right to have the materials judged under the community standards of Iowa should not be defeated by a transfer to a jurisdiction in which the factfinder would not be able to apply Iowa standards (Pet. App. 2, p. 5). It concluded that because jurors must apply their own knowledge of the standards of the community in which they reside, jurors in California could not determine the community standards of Iowa.

The defendants were reindicted in Iowa on June 19, 1975.[1] They again moved for a transfer, and the motion was granted by petitioner McManus for the same reasons that he had granted the first motion to transfer (Pet. App. 3). Judge McManus also noted health considerations concerning petitioner Elkins and the fact that his presence in California was required on other criminal matters (Pet. App. 3, pp. 5-6). The court again concluded that an Iowa trial would cause more inconvenience

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[1]Richard J. Aronson, who was charged in the first indictment, was named as an unindicted co-conspirator in the second.

to the defendants than a California trial would cause to the prosecution (Pet. App. 3, p. 6). Judge McManus reiterated his belief that a California jury could apply Iowa community standards (Pet. App. 3, p. 6). Although Judge McManus acknowledged that the indictment had been dismissed in California after the first transfer, he wrote that a different judge in California might receive the second transfer and might not dismiss the indictment; in any event, he wrote, the government could appeal a second dismissal (Pet. App. 3, p. 7).

The United States, stymied by apparent inability to prosecute this case in either Iowa or California, petitioned for a writ of mandamus, which the court of appeals granted. It noted that Congress specifically permitted obscenity prosecutions in recipient districts, and that this Court has held that local rather than national standards must be used to judge obscenity (Pet. App. 4, pp. 7-9). The court concluded that the local community standards requirement, coupled with the prosecution's decision to bring the indictment in Iowa, required that the obscenity *vel non* of the materials be determined according to Iowa community standards. In light of the holding of the California district court that expert testimony would not enable a California jury to apply Iowa standards, the court of appeals held that the trial must be in Iowa.

DISCUSSION

The parties to this case, and all three lower courts that have passed upon it, have treated "community standards" as if they were defined by specific geographic limits, and as if one set rather than another of these standards were the "right" one to be applied to each case. The parties and courts have assumed that, if the case is tried in California, the factfinder must assess the materials under Iowa standards. That view, together

with Judge McManus's belief that the case should be tried in California, led to a position in which the case could not be tried at all.

The United States believes that the role of "community standards" in obscenity cases is not to define a specific, "right" set of standards by which to evaluate the materials in question. We submit, instead, that the correct position was stated in *United States* v. *Cutting*, 538 F. 2d 835 (C.A. 9) (*en banc*), petition for a writ of certiorari pending, No. 76-10. As the Ninth Circuit put it (538 F. 2d at 841):

> The purpose of the "community standards" instruction is not to distinguish attitudes in one area from those in another, but rather to distinguish personal or aberrant views from the generalized view of the community at large.
>
> This Court has disapproved "national standards" because no such standards are ascertainable or are known to jurors, not because the local standards of a particular community must be applied in every case, even when a search for such standards leads (as it did here) to prolonged litigation and considerable delay. The Court indicated in *Hamling* v. *United States*, 418 U.S. 87, 105-106, that the relevant community ordinarily would be the judicial district in which the trial took place. We do not believe that the community in which the offense occurred necessarily is the only possible one upon which to base "community standards" instructions if, for compelling reasons, the trial must be held elsewhere.

Whether this is the correct view of the role of "community standards" instructions may well be determined in *Marks* v. *United States*, No. 75-708, argued November 1 and 2, 1976. We contended in that case (Br. 41-45) that the primary role of the community standards in-

struction is to require the jurors to look to the community around them, rather than their own personal sensibilities, when determining whether material is patently offensive or appeals to the prurient interest.[2] If the Court should adopt that position, the foundation of the court of appeals' decision in the instant case—its assumption that a California jury would be required to apply Iowa standards—would be undermined, and it might be appropriate to remand this case for further consideration. We therefore believe that the Court should defer disposition of this case pending its decision in *Marks*.

In taking this position about the role of "community standards" in obscenity cases, we do not imply that the standards and values of the community in which sexually oriented materials are distributed are irrelevant. Far from it; 18 U.S.C. 1461 and 1462 were amended in 1958 in order to allow obscenity prosecutions to take place in the district where the materials were received. *United States* v. *Luros*, 243 F. Supp. 160, 176-177 (N.D. Iowa), reversed on other grounds, 389 F. 2d 200 (C.A. 8), certiorari denied, 382 U.S. 956; *United States* v. *West Coast News Co.*, 30 F.R.D. 13, 18-19 (W.D. Mich.). In amending the statutes, Congress made it plain that obscenity prosecutions ought to be conducted in the district in which the materials are received. S. Rep. No. 1839, 85th Cong., 2d Sess. 3 (1958); H.R. Rep. No. 1614, 85th Cong., 2d Sess. 7 (1958). Cf. *Miller* v. *California*, 413 U.S. 13, 32: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas

[2]We are furnishing to counsel for petitioner a copy of our brief in *Marks*.

or New York City." In ordinary criminal cases in which venue may be laid in more than one district, the prosecution's choice of venue is entitled to considerable deference;[3] in obscenity cases, because of the special interest of the district into which the materials are sent in preserving its own standards, the prosecution's choice of venue should be accepted in all but extraordinary circumstances.

Because a transfer of an obscenity case creates the risk of frustrating the ability of the district into which the materials were sent to enforce its own standards, there should be a heavy presumption against transfers, although they should not be precluded. The court of appeals in the instant case recognized the existence of such a presumption. The district court did also. But Judge McManus determined that the balance of inconvenience still required the prosecution to be held in California. We think that this was error, because it did not reflect sufficient deference to the receiving district's interests and was based upon the incorrect belief that a California jury could apply Iowa standards. Cf. *Hamling, supra*, 418 U.S. at 106.

The court of appeals therefore was justified in issuing a writ of mandamus to compel the trial to be held in Iowa.[4] The court did not rely primarily on such

[3]*Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245-246; *United States* v. *National City Lines, Inc.*, 334 U.S. 573. Indeed, until the adoption of Fed. R. Crim. P. 21, criminal cases could not be transferred at all, no matter how great the inconvenience to the defendants. See the Notes of the Advisory Committee on Rules on the 1966 amendment to Rule 21(b), 18 U.S.C., p. 4500.

[4]Mandamus usually may not be used to correct simple errors by district courts. This case is unusual, however, because in the view of petitioner McManus the case must be prosecuted in California, and in the view of the district court in California

considerations, however, but instead founded its opinion on a view of the role of "community standards" instructions that we believe is unsound. We submit that this case should be tried in Iowa, but if compelling circumstances require its transfer elsewhere, the jury should be instructed to apply the "community standards" of the judicial district in which the trial is held.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's decision in *Marks* v. *United States, supra.*

Respectfully submitted.

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the case must be prosecuted in Iowa. The issuance of a writ of mandamus therefore was necesary in order to ensure the right to prosecute the case at all. See *Will* v. *United States*, 389 U.S. 90, 97-98; *Ex parte United States*, 242 U.S. 27.

Petitioners' assertion (Pet. 20) that the United States engaged in appellate forum shopping by seeking mandamus in the Eighth Circuit, rather than by appealing the dismissal of the indictment in the Ninth Circuit, is unfounded. If, as we urge, an obscenity case ought not to be transferred from the district in which the prosecution was commenced, and if a jury in California should not apply Iowa standards, then the appropriate course of action was to seek appellate review of the propriety of the transfer, not the propriety of the dismissal of the indictment. A reversal by the Ninth Circuit of the California decision still would have left this case to be tried in California.

Supreme Court, U. S.
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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1976
No. 75-1899

HONONABLE EDWARD J. McMANUS, Chief Judge, United States District Court, Northern District of Iowa, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Contrary to the Government's suggestion at page 6 of its Memorandum, this Court should not defer disposition of the case and then remand to the Eighth Circuit; the Eighth Circuit cannot control the Central District of California, which is the source of the problem. Instead, this Court should immediately grant certiorari and resolve an issue which has split two districts.

Respectfully submitted

ROGER JON DIAMOND